

Law & Technology

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The legal battle over the sex.com case may be over, but it seems that there is no end to the hanky-panky when it comes to online domain names.

In *Kremen v. Cohen*, the 9th U.S. Circuit Court of Appeals recently rejected the latest appeal by pornography king Stephen Michael Cohen of a \$65 million award to sex.com's original registrant, Gary Kremen. Kremen alleged that Cohen misappropriated that domain name.

Kremen has settled his conversion claim — alleging that the domain name was improperly transferred to Cohen — with the one immediately available deep pocket, Network Solutions Inc.

Herndon, Va.-based NSI was the registrar of the sex.com domain. It allegedly allowed the domain name to be transferred to Cohen without Kremen's consent. The confidential settlement reportedly was for somewhere around \$15 million.

In the course of this decade long legal adventure, Kremen helped blaze new trails in the field of registrar liability and domain name law.

The sex.com case began in 1994, before the explosion of the Internet as a medium for selling goods, services and pornography. When Kremen first registered sex.com, only one company, NSI, was registering names, and it was giving them away for free.

Kremen and the courts have been forced to grapple with the thorny question of whether a domain name is capable of being converted — a legal theory normally requiring that some tangible property be misappropriated to another person without consent. The legal confusion was compounded by the fact that there was no enforceable contract between Kremen and NSI since Kremen had paid no consideration for the domain.

But the method by which control of the domain was wrested away from Kremen was quite old-fashioned. It was accomplished by simple forgery and fraud.

Cohen sent a letter to NSI purporting to have come from Kremen's company, disclaiming any interest in sex.com — which Kremen had let sit idle — and asking Cohen to so inform NSI. The letter purportedly was signed by Kremen's then-housemate, though the court subsequently noted her signature was misspelled.

NSI did nothing to verify the authenticity of the letter and, accepting the letter at face value, transferred the registration of sex.com to Cohen. He then built a multimillion-dollar porn empire around the domain, much to the chagrin of Kremen, who by then recognized the tremendous value of a generic, second-level domain name such as "sex" in the dot-com world.

Millions of dollars and several court battles later, Kremen succeeded in procuring the return of the sex.com domain registration. To boot, he obtained a \$40 million compensatory and a \$25 million punitive damages award from the U.S. District Court in San Francisco against Cohen, who apparently took all his assets and fled the United States to an undisclosed location where even bounty hunters hired by Kremen cannot find him.

Important issues remain

Whether Kremen ever collects this judgment, and whether the case is finally over, important legal issues remain.

In 2003, in *Kremen v. Cohen*, the 9th Circuit reversed the trial court and held that an Internet domain name is property subject to being improperly taken or converted by another. The ruling allowed tort claims to be brought when a domain name is wrongfully transferred even though no enforceable contract exists or when contract remedies may be too limited. Still, the issue remains open.

The 9th Circuit based its ruling on its self-described "grudging reading" of California law as to whether a domain name fell within an exception allowing intangible property not merged into some document — like a stock certificate — to be the subject of a conversion claim. The question of whether something is property subject to conversion is not a federal legal question, but one of state law.

The federal appellate court in this case had offered the opportunity to clarify California law, by means of certified question, to the California Supreme Court. But that high court demurred. When forced to make the determination of California law itself, the 9th Circuit interpreted California case law from the late 1800s to permit such a claim despite the argument that the domain name was no more than a routing protocol and thus not tangible property.

The 9th Circuit held that the domain name system was in fact a document or collection of documents stored in electronic form. The court found that the domain name is similar to a stock certificate, which is associated with the

intangible property, and that the intangible value of a domain name is associated with the domain name system records. Such records associate word-based domain names with particular computers networked on the Internet.

But the 9th Circuit went further. It noted that if it were necessary for it to do so, it would hold all property, tangible or intangible, as being capable of conversion — and would reject the approach set forth in “Restatement (Second) of the Law of Torts” permitting conversion only where there is a merger of intangible property in some document.

However, because this decision is based on a federal court’s interpretation of one state’s law, it does not set strong precedent for other courts applying the property laws of different states. In fact, other federal decisions, most notably from the Eastern District of Virginia where NSI was based, hold to the contrary. It remains to be seen where the other circuits or states will come down on this debate.

Dilemma remains

The Kremen victory and the eventual settlement by NSI have not deterred continued shenanigans or carelessness with domain names, as was recently experienced by one of New York’s oldest commercial Internet service providers, Panix.com.

In mid-January of this year, ownership of the Panix.com domain name was moved to Australia, the company’s domain name server records were moved to the United Kingdom, and the company’s e-mail was redirected to a company in Canada, all without Panix.com’s knowledge or consent.

The fiasco resulted in Panix.com’s customers, many of whom are in New York City, Long Island and New Jersey, being deprived of Internet and e-mail access for a few days, and in the potential compromise of customers’ private e-mail and passwords.

Two well-known domain registrars were involved in the Panix.com incident, but proper verification of the transfer request was not obtained. The receiving registrar in Australia, responsible for obtaining the validation, had delegated the responsibility to its reseller, which failed to obtain the validation.

In its investigation of the Panix.com incident, the Internet Corporation for Assigned Names and Numbers (ICANN, a private, nonprofit corporation that currently governs the domain name system), expressed concern that the recipient registrar had delegated the verification to a third-party reseller. But a proposed rule that would have required the recipient registrar to have sole responsibility for verification of the transfer request was rejected when ICANN recently adopted new procedures to regulate transfers of domain names from one registrar to another.

Panix.com was able to regain its domain name rather quickly. It took a determined Kremen a number of years and a lot of legal fees to do so. Others may not fare as well. Owners of domain names must exercise vigilance and diligence. The courts will have to continue to address the inevitable claims and disputes.

We will see where other courts wind up in determining whether a domain name is property and how they will deal with the continuing, thorny legal issues in this area.

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Mr. Rojas holds the highest ratings assigned by Martindale-Hubbell, and he is listed in several “Who’s Who” publications including Marquis’ Who’s Who in American Law, Who’s Who In Florida’s Latin Community, Who’s Who In Intellectual Property, and Who’s Who in International E-Commerce. He is fluent in Spanish.